Thus it has been held in one case which says that the negligence of the driver is imputed to the guest where both are engaged in a joint enterprise, in which the transportation is a factor, that to establish a joint adventure "the passenger must have either express or implied right to direct the movement of the vehicle used." *Robison* v. *Oregon-Washington R. & Nav. Co.*, 90 Ore. 490, 176 Pac. 594.

The repudiation of the doctrine of imputed negligence, it must be understood, does not excuse the passenger or guest from exercising any care. If he does not exercise such care as a reasonably prudent man would exercise under the circumstances he cannot recover for injuries occasioned thereby. *Brommer* v. *Pa. R. Co.*, 179 Fed. 577, 103 C. C. A. 135. For a discussion of the meaning of "due care" see 19 MICH. L. REV. 433. In the principal Wisconsin case the guest was being sued, and the court finding him guilty of no active contributory negligence, absolved him from blame, even though he happened in this case to be a part owner of the machine driven by the negligent driver. In the earlier Wisconsin cases the court had imputed the driver's negligence to the guest on the theory of agency; and if such agency view was really sound, the conclusion would be almost inevitable in the principal case that the guest was liable. When the agency theory was thus really put to the test, the court had to upset some of its earlier doctrine. Most generally cases involving the contributory negligence of the guest are those in which a guest sues a third person whose negligence, the guest alleges, caused the injuries sued upon, and the third party interposes the contributory negligence of driver and guest.

A guest has been precluded from recovery where the negligent driver operated the vehicle at excessive speed at the suggestion and direction of the guest who wanted to arrive at a depot in time to meet a train, *Langley* v. *Southern Ry. Co.*, 113 S. C. 45, 101 S. E. 286; where the guest continued to ride with full knowledge of the fact that there were no lights on a car which was being driven on unfamiliar roads, *Rebillard* v. *Railroad Co.*, 216 Fed. 503; and where the guest remained in the machine with full knowledge of the fact that the driver was so intoxicated as to be unable to operate the machine properly. *Lynn* v. *Goodwin*, (Cal., 1915), 148 Pac. 927.

All these are really examples of independent negligence on the part of the guest. The old doctrine of imputed negligence must now be regarded as thoroughly exploded. H. A. A.

THE NEWBERRY CASE.—Senator Newberry of Michigan and sixteen others were convicted in the United States District Court on the charge that they "unlawfully and feloniously did conspire, combine, confederate, and agree together to commit the offense [in the Newberry indictment] on his part of wilfully violating the act of Congress approved June 25, 1910, as amended, by giving, contributing, expending, and using and by causing to be given, contributed, expended and used in procuring his nomination and election at said primary and general elections, a greater sum than the laws of Michigan

permitted and above ten thousand dollars," etc. The Act of Congress referred to (c. 392, 36 Stat. 822-824, amended c. 33, 37 Stat. 25-29) commonly known as the Federal Corrupt Practices Act, provides: "No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the state in which he resides," etc. This Act read in connection with the Michigan statute fixed the maximum sum so allowed to be expended by a candidate for the United States Senate at $3,750. The trial court overruled a demurrer challenging the constitutionality of the Act of Congress.

On the trial the court (Judge Sessions) charged the jury *inter alia* as follows:

> (c) "To apply these rules to this case: If you are satisfied from the evidence that the defendant, Truman H. Newberry at or about the time that he became a candidate for United States Senator was informed and knew that his campaign for the nomination and election would require the expenditure and use of more money than is permitted by law and with such knowledge became a candidate, and thereafter by advice, by conduct, by his acts, by his direction, by his counsel, or by his procurement he actively participated and took part in the expenditure and use of an excessive sum of money, of an unlawful sum of money, you will be warranted in finding that he did violate this statute known as the Corrupt Practices Act."

In the Supreme Court the Justices were unanimously of the opinion that the judgment should be reversed for error in the charge quoted, Chief Justice White referring to the charge of the trial court as a "grave misapprehension and grievous misapplication of the statute." Five members of the Court (McReynolds, Day, McKenna, VanDevanter, and Holmes) were of the opinion that the Act of Congress was unconstitutional. The concurrence of Mr. Justice McKenna, however, was with the reservation of a possible contrary conclusion if the Seventeenth Amendment could be taken into account. Mr. Justice Pitney delivered an opinion in which Brandeis and Clark, J. J., concurred upholding the power of Congress, while the Chief Justice in a separate opinion arrived at the same conclusion. *Truman H. Newberry et al* v. *United States,* U. S. Sup. Ct., No. 559, May 2, 1921.

The fault found in the charge above quoted is succinctly stated by Mr. Justice Pitney as follows:

> "However this may be regarded when considered in the abstract, the difficulty with it, when viewed in connection with the evidence in the case to which the jury was called upon to apply it, is that it permitted and perhaps encouraged the jury to find the defendants guilty of a conspiracy to violate the Corrupt Practices Act if they merely con-

templated a campaign requiring the expenditure of money beyond the statutory limit even though Mr. Newberry, the candidate, had not, and it was not contemplated that he should have, any part in causing or procuring such expenditure beyond his mere standing voluntarily as a candidate and participating in the campaign with knowledge that moneys contributed and expended by others without his participation were to be expended. * * *

"A reading of the entire Act makes it plain that Congress did not intend to limit spontaneous contributions of money by others than a candidate, nor expenditures of such money except as he should participate therein. * * * Spontaneous expenditures by others being without the scope of the prohibition, neither he nor anybody else can be held criminally responsible for merely abetting such expenditures.

"It follows that one's entry upon a candidacy for nomination and election as a Senator with knowledge that such candidacy will come to naught unless supported by expenditure of money beyond the specified limit, is not within the inhibition of the Act unless it is contemplated that the candidate shall have a part in procuring the excessive expenditures beyond the effect of his mere candidacy in evoking spontaneous contributions and expenditures by his supporters; and that his remaining in the field and participating in the ordinary activities furnish in a general sense the 'occasion' for the expenditure is not to be regarded as a 'causing' by the candidate of such expenditure within the meaning of the statute."

The Court's conclusion on the interpretation of the Corrupt Practices Act and the propriety of the charge to the jury are of course interesting and important, but by far the most vital part of the case is that dealing with the power of Congress to legislate regarding primary elections of candidates for the National Legislature. In many of the cases involving constitutional questions decided by a divided court the differences are due to varying views as to economic and social policies and theories. As to these one may agree or disagree, but it is pretty difficult to say with assurance that either position is *wrong*. The *Newberry* case, however, turns on a question which is purely one of construction of the Constitution, and it is believed that one is warranted in saying, with all deference, that the majority conclusion is unsound.

By the Constitution it is provided: "All legislative Power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives" (Art. I, Sec. 1); "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places for chusing Senators" (Art. I, Sec. 4); "The Congress shall have power * * * to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Offi-

cer thereof" (Art. I, Sec. 8, Cl. 18). Since Senators are officers of the United States and the office exists solely by virtue of the Constitution we assume that it would not be seriously questioned, if there were no other provisions therein regarding the manner of their selection or limiting the legislative power of the Federal Government in respect thereof, that Congress would have plenary power over all matters relating to their choice. It has long been settled that Congress may provide for the conduct of the election proper. *Ex parte Siebold,* 100 U. S. 371; *United States* v. *Gradwell,* 243 U. S. 476. Regulation of primaries, admittedly of no other purpose than to determine whose names shall go on the ballots in the general election, surely would be no farther removed from the end to be accomplished than was the creation of the bank upheld in *McCulloch* v. *Maryland,* 4 Wheat. 316. The classic statement by Chief Justice Marshall in that case (p. 421) seems entirely applicable: "We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."

Many cases might be referred to in which Congressional action has been upheld where the immediate subject of the legislation was as far or farther removed from the subject control over which was vested by the Constitution in federal hands, as regulation of primaries is removed from a Constitutional provision by which is created the office to be filled. See *Second Employers Liability Cases,* 223 U. S. 1 (relations between common carriers and their employes); *Selective Draft Law Cases,* 245 U. S. 366 (registration of man power and imposition of compulsory military service); *United States* v. *Ferger,* 250 U. S. 199 (punishment of the fraudulent making of spurious interstate bills of lading); *Ruppert* v. *Caffey,* 251 U. S. 254 (prohibition of manufacture of *non-intoxicating* beer). And in *In Re Neagle,* 135 U. S. 1, the provision of section three Article two, that the President "shall take care that the laws be faithfully executed" was deemed sufficiently close to the matter of protection of United States judges to support the assignment of a deputy marshal to protect Mr. Justice Field from the Terrys.

Is there anything in the Constitution that denies or limits such power of Congress? It may be argued that Sec. 4 of Art. I, above quoted, does so. Surely there is nothing else that can be relied upon as even tending to uphold such a claim. It would seem perfectly apparent, however, that the section referred to is a constitutional delegation of power to the states, and even that has a string tied to it. Were it not for the fact that five of the members of the Supreme Court are of the opinion that Art. I, Sec. 4, is a *grant of power to Congress,* in fact the only basis for any claim by Congress to control even elections of Senators and Representatives, one would

feel almost warranted in saying that it was absurd to contend that the section was anything other than as above stated. It is the *States,* not the *Federal Government,* that get their power from that section.

The inherent reasonableness of the view of the minority is apparent when it is realized that in truth in a large percentage of the states it is the primary election, not the general election, that determines who the officers shall be. The decision of the majority means that in those states Congress is virtually helpless in the control of the selection of its own members. To be sure seats may be denied, but at best that is an uncertain remedy, and so far as punishment is concerned there can be none—at least so far as Congress is concerned—except in such denial of a seat.